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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF VIRGINIA,
RICHMOND DIVISION

Civil Action No. 1149

BROOKS TRANSPORTATION COMPANY, INCORPORATED, A B & C MOTOR TRANSPORTATION COMPANY, INC., M & M TRANSPORTATION COMPANY,

Plaintiffs,

and

REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC.,

Intervening Plaintiff,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION,

Defendants,

and

SCHENLEY INDUSTRIES, INC., LENOIR CHAIR COMPANY, INC., NATIONAL COUNCIL OF PRIVATE MOTOR TRUCK OWNERS, INC., PRIVATE CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., AND NATIONAL INDUSTRIAL TRAFFIC LEAGUE,

Intervening Defendants

STATEMENT AS TO JURISDICTION

(Filed December 18, 1950)

In compliance with Rule 12 of the Supreme Court of the United States, as amended, plaintiffs-appellants submit

herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause.

Opinion Below

The opinion of the District Court of the United States for the Eastern District of Virginia, Richmond Division, is reported only in 7 Federal Carrier Cases, paragraph 80, 614, p. 2382. A copy of the opinion and the judgments of October 21 and November 17, 1950, are attached hereto as Appendix A.

Jurisdiction

This is an action to set aside two orders of the Interstate Commerce Commission brought under Title 28, United States Code, sections 1336 and 2321-2325, inclusive. The final judgment of the District Court was entered on October 21 or November 17, 1950. A petition for appeal is presented to the District Court herewith on this 18th day of December 1950. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Schenley Dist. Corp* v. *United States,* 326 U. S. 432; *Cornell Steamboat Co.* v. *United States,* 321 U. S. 634; *United States* v. *Hancock Truck Lines,* 324 U. S. 774; *United States* v. *Detroit & Cleveland Nav. Co.,* 326 U. S. 236; *American Trucking Associations* v. *United States,* 326 U. S. 77; *Rochester Teleph. Corp. v. United States,* 307 U. S. 125.

Question Presented

Is a non-carrier business or enterprise a common or contract carrier by motor vehicle as defined in and, therefore, subject to those provisions of part II of the Inter-

state Commerce Act regulating common and contract carriers by motor vehicle, or is it a private carrier by motor vehicle as defined in and, therefore, not subject to such provisions, with respect to motor vehicle operations conducted by it in the transportation to its customers of property manufactured and sold or for sale by it for which transportation it makes and receives a charge or compensation, direct or indirect, comparable in rate and amount with that of common carriers by rail or motor vehicle; and which motor vehicle operations are also employed by it in the transportation, on return trips, of materials and supplies to its own plant or place of business or those of its subsidiaries for use in the manufacture of products?

More succinctly, though less comprehensively, the question may be put thus: May a manufacturer or merchant engage in the transportation by motor vehicle for compensation of goods of which he is the seller in furtherance of the sale thereof without assuming the status of a common or contract carrier as defined in § 203(a)(14) and (15), and complying with the provisions of part II of the Interstate Commerce Act applicable to such carriers?

All the points raised in the Assignment of Errors are also presented. The Question Presented, as stated above, sets forth the major issue.

Statutes Involved

Section 203(a)(14)(15)(17) (49 U.S.C. § 303(a) (14)(15)(17)) of the Interstate Commerce Act, as amended, and the National Transportation Policy prefacing said Act are copied in Appendix B.

Statement

The facts respecting the motor carrier operations involved are stated by the Commission in its reports (48 M.C.C. 259 and 405; 51 M.C.C. 65) upon which the orders

here assailed are based are not in dispute. The reports are attached to the Complaint as exhibits E, I, and G. The following facts are drawn from the reports.

Appellee, Lenoir Chair Company, Inc., henceforth called Lenoir, manufacturers furniture at Lenoir and Newton, N. C. Since 1929 it has transported a portion of its products in its own trucks from said points to its customers in some 15 States and, on return, whenever possible, materials and supplies to and for use in its factories. Its status as a carrier having been questioned, and to secure a determination of its status as a motor carrier under the Interstate Commerce Act, it filed with the Commission an application under § 209 of the Act for a permit authorizing the continuance as a contract carrier of the above mentioned motor carrier operations in which it was engaged. Conceiving that such operations were those of a private carrier and as such not subject to the provisions of the Act except those relating to safety of operations, hours of service of employees, and standards of equipment, Lenoir concurrently filed therewith a motion for dismissal of the application and accordingly made no effort to establish that such operations are required by the public convenience and necessity or that they would be consistent with the public interest and the national transportation policy.

In its transportation activities it operates 5 trucks in long-distance hauling and 6 or 7 in interplant service. It transports and desires to transport outbound only its finished furniture to its customers and inbound only materials and supplies used by it in its factories. Between 15 and 20 percent of its annual production, approximating $3,000,000, has been transported in its own trucks, the balance by rail and motor common carriers. The possibility of a return haul of supplies influences to some extent its determination whether it will transport outbound shipments

in its own vehicles to particular destinations, but in many instances its vehicles return empty. Lenoir claims, however, that this consideration is not absolutely controlling because considerations such as the needs of its customers, the availability of for-hire carriers, the expedition of delivery and good will are also given weight.

Sales are f.o.b. factories and, when delivery is made in its own vehicles, it adds to the factory price a transportation charge, separately shown on its invoice, comparable to the charges of rail or motor carriers which are also used to the same destinations. This is done so that delivery price at destination will be the same as that when the furniture moves by a carrier for hire and "so as not to be unfair competition to any other carrier."

Materials and supplies are usually purchased f.o.b. origin, and sometimes a freight allowance is made by the supplier.

Lenoir maintains an account reflecting income and expenses incurred in its truck operations. On outbound shipments the amount collected, equal to the motor carrier or rail rate is shown. The record does not show whether the income account includes a credit for the return transportation of plant supplies, except for the occasional freight allowances. For the year ending June 30, 1946, its trucks traveled 205,020 miles, truck revenues amounted to $28,874, expenses to $47,619, and loss in truck operations were $18,746.

It does not hold itself out to the general public or to anyone as a common carrier by motor vehicle nor are its services available to anyone as a contract carrier under individual contracts or agreements.

Appellee, Schenley Industries, Inc., formerly named Schenley Distillers Corporation, henceforth referred to as Schenley, owns a number of subsidiary corporations

engaged in the manufacture of alcoholic liquors or accessories used in such enterprises.

Prior to April 1946, some of the transportation of products outbound from and some of the transportation of materials and supplies inbound to the plants of the various subsidiaries were performed by Schenley Distilleries Motor Division, a separate corporate subsidiary set up for that purpose. For such service, Motor Division was paid by the other subsidiaries and Schenley a fixed amount each week for each truck used and a charge of 10 cents per truck mile. To secure a determination of its status as a private carrier, Motor Division filed with the Commission and prosecuted an application for a permit authorizing operation as a contract carrier. The application was denied upon a finding that its motor vehicle operations were those of a contract carrier and that the consistency thereof with the public interest, etc., had not been established (44 M.C.C. 171). The district court for the District of Delaware agreed with the Commission and the Supreme Court affirmed. *Schenley Distillers Corp.* v. *United States*, 326 U. S. 432.

Thereafter, in April 1946, Schenley, in the belief that it would be a private carrier as defined in § 203(a)(17) of the Act, instituted the motor carrier operations here in question. On May 7, 1946, it filed with the Commission an application under § 209 of the Act for a permit authorizing such operations as a contract carrier by motor vehicle of alcoholic liquors and materials and supplies used in their manufacture and sale between all points in 15 States. This was done solely for the purpose of securing a determination of its status under the Act and no attempt was made to prove that the operations would be consistent with the public interest and the national transportation policy.

It owns 32 tractors, 31 trailers and a service truck for

which it maintains garage and maintenance facilities at Lawrenceburg, Ind., near the plant of one of its subsidiaries. At the time of the hearing before the Commission in September 1946, Schenley's motor operations were confined to service to and from such plant but it intends to operate to and from other of its subsidiaries.

From facts of record, the Commission estimated that in 1946 Schenley handled less than .05 percent of the traffic moving to and from this plant.

Schenley purchases and takes title to the entire output of case liquors of its subsidiaries at the distilleries at a price consisting of the entire cost of manufacture plus tax and resells at a higher price. Cost of manufacture includes charges for inbound transportation of materials and supplies. Outbound transportation to its purchasers of liquor sold by Schenley is accomplished by rail and motor common carriers and in part by Schenley's trucks. When transported by common carrier, it is sold f.o.b. origin, and when transported by Schenley, it is sold f.o.b destination. In the latter case, the lump sum price to the customer consists of the sale price at origin plus a sum roughly equivalent to the rail charges from origin to destination. Hence the cost to the purchaser is uniform regardless of the method of transportation utilized.

When Schenley performs the outbound service, no bills of lading are issued nor is any contract of transportation entered into between it and anyone else. Information respecting origin, destination, consignee and weight, but no charge for transportation is recorded on a "Schenley Affiliates Trip Sheet" by the distillery from which the shipment is moved.

All distillery materials and supplies are purchased f.o.b. origin apparently by Schenley's subsidiaries which carry them in their inventories. Occasional inbound movements

of such materials and supplies are made in Schenley's trucks upon the request of the traffic manager of the subsidiary to which delivery is made. As is the case with outbound transportation, no bills of lading are issued nor is any contract of transportation entered into between Schenley and anyone else. All pertinent information is recorded on a "Schenley Affiliates Trip Sheet."

None of the expenses of operation incurred in the inbound service is charged against any of the subsidiary corporations. All expenses incurred in the operations in outbound service are borne by Schenley and accounted for in its books. Claims for loss or damage of packaged liquors are paid by it.

With the foregoing facts before it, Division 5 of the Commission, one Commissioner dissenting and the third concurring in the result, found that both Lenoir and Schenley are private carriers as defined in section 203(a)(17) of the Act and not common or contract carriers as defined in section 203(a)(14)(15) and accordingly ordered dismissal of the applications.[1] (48 M.C.C. 259 and 405.) Upon oral argument pursuant to petitions therefor and for reconsideration, the Commission, one Commissioner dissenting and two being absent, made findings similar to Division 5, sustained the Division in both proceedings in one report (51 M.C.C. 65), and allowed its orders to stand. The conclusions supporting the findings are that the respective applicants are primarily engaged in the manufacture of furniture and in the sale and distribution of alcoholic liquors

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[1] In the *Schenley* case, two of the Commission's examiners in their report (Exhibit D to the Complaint herein) concluded that Schenley was a contract and not a private carrier and recommended denial of the application for failure of applicant to establish that its operations would be consistent with the public interest and the national transportation policy as required by § 209(b) of the Act. Upon exceptions thereto filed by applicant and replies thereto, Division 5 reversed the examiners.

and the motor operations of each are conducted as a bona fide incident to and in furtherance of their primary business and not for the purpose of profiting from the transportation as such (51 M.C.C. loc. cit. 76).

The three motor carrier plaintiffs brought this action in the United States District Court for the Eastern District of Virginia, Richmond Division, under Title 28, United States Code, sections 1336 and 2312-2325 to review the Commission's decisions and to set aside its order of May 27, 1948, dismissing Lenoir's application, and its order of June 21, 1948, dismissing Schenley's application. Regular Common Carrier Conference of the American Trucking Associations, Inc., leave granted, intervened as a plaintiff. The District Court, upon the pleadings, the arguments of counsel and briefs submitted filed its opinion on October 3, 1950, and on October 21 or November 17, 1950, entered final judgment dismissing the action. The court held that the Commission's interpretation of the Act and its holding that Lenoir and Schenley are private carriers is correct on the score of reason and authority and in the light of the history and manifest purposes of the Act.

The Question Is Substantial

The issues involved in this appeal are of great importance to the public transportation industry and the industrial and mercantile commerce of the United States and to the administration of the Interstate Commerce Act. Their importance to the administration of the Act is attested by the fact that the decisions of Division 5 were reconsidered by the entire Commission upon oral argument before it. Their importance to the public transportation industry and to the industrial and commercial business of the country is evidenced by the fact that the following organizations participated in the proceedings before the Commission: In op-

position to the decisions of Division 5: Regular Common Carrier Conference of the American Trucking Associations, Inc., Rail Carriers in Trunk Line Territory, Contract Carrier Conference of the American Trucking Associations, Inc., and Associated Motor Carriers, Inc., of South Dakota. In support of said decisions: Indiana State Chamber of Commerce, Detroit Board of Commerce, Central Territory Rate Conference, National Council of Private Motor Truck Owners, Inc., Private Carrier Conference of the American Trucking Associations, Inc., Illinois Territory Industrial Traffic League, Wisconsin Manufacturers Association, Southern Traffic League and National Industrial Traffic League.

The issues involved raise an important question of law which has not been, but should be, settled by the Supreme Court.

The national transportation policy declares the Congressional intent to provide for fair and impartial regulation of all modes of transportation subject to the Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices and to encourage fair wages and equitable working conditions; all to the end of developing and preserving a national transportation system by water, highway and rail as well as other means, adequate to meet the needs of commerce. The policy directs that all provisions of the Act shall be administered and enforced to carry out its declarations (54 Stat. 899; note to 49 U. S. C. 1). That policy "is the Commission's

guide to 'the public interest' * * *." *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 82. Attainment of the policy and the remedial character of the Act require that its provisions be liberally interpreted so as to bring under its dominion all carrier operations included within its expressed terms and by narrow construction of exemptions and provisions in the nature of or effecting exemptions to exclude only such carrier operations as clearly fall within their terms. *McDonald* v. *Thompson*, 305 U. S. 263, 266; *Gregg Cartage & S. Co.* v. *United States*, 316 U. S. 74, 83; *Piedmont & N. R. Co.* v. *I. C. C.*, 286 U. S. 299, 311. In the words of the Commission in Southern Fruit Distributors application, 31 M.C.C. 771, 776:

> "That act represents remedial legislation and contemplates a complete and comprehensive regulation of motor carriers for hire. Any exemption from its certificate and permit requirements, provided either directly or indirectly by exclusion from its definitions of common and contract carrier, must be determined by the rule of strict construction and in accordance with the declared policy of Congress as enunciated therein."

The definitions of common and contract carrier by motor vehicle are clear and comprehensive. They evince the statutory intent in keeping with the national transportation policy to regulate as common or contract carriers all who practice receipt of compensation by whatever name called or under whatever guise received for transportation by motor vehicle.

Nevertheless, the District Court and the Commission read Lenoir and Schenley out of and exempted them from the certificate and permit and other provisions of the Act regulating common and contract carriers although they receive compensation for motor transportation and their services

are available to that portion of the public purchasing goods from them. Clearly Lenoir and Schenley fall within one or the other of the statutory definitions of common and contract carrier. By § 203(a)(14) " 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle • • • of • • • property or any class or classes thereof for compensation". By § 203(a)(15) " 'contract carrier by motor vehicle' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) • • •) by motor vehicle of • • • property • • • for compensation." It is patent that when a motor carrier is in receipt of compensation for transportation service performed by him all of the incidents of his operation must be examined in the light of these two definitions. If the service is only casual or occasional, he is exempt under § 203(b)(9). If he holds himself out to the public generally or to that part of the public desiring or having need for the limited service offered, he is a common carrier and may be regulated as such. This is so, whether or not the transporter owns or has some interest in the property other than as bailee for purposes of transportation. *United States* v. *Ohio Oil Co.*, 234 U. S. 548, 559-560; *New York, N. H. & H. R. Co.* v. *I. C. C.*, 200 U. S. 361; *Salyards, Ext. of Operations*, 46 M. C C. 303, 305.[2] If he renders his service only in pursuance of individual contracts or agreements, he is a contract carrier. *Schenley Distillers Corp.* v. *United States*, 326 U. S. 432; *Southern Fruit Dist., Inc.*, 31 M. C. C. 771, 776; *Enterprise Trucking Corp.*, 27 M. C. C. 264; *Lukens Steel Co.*, 42 M. C. C. 672.[3]

[2, 3] Each of these cases presented the issue whether transportation operations constituted private carriage as distinguished from common or contract carriage.

In the following cases among many others the receipt by the transporter of property owned by him or in which he had an interest other than as bailee for transportation of a sale price at destination higher than the cost of the property at origin was held to be compensation for transportation: *A. W. Stickle & Co.* v. *I. C. C.*, 128 F. 2d 155; *Carpenter*, 2 M. C. C. 85; *Monninger*, 2 M. C. C. 501; *Georgia*, 3 M. C. C. 601; *Johnson*, 10 M. C. C. 4; *Turner*, 29 M. C. C. 691; *Ogas*, 32 M. C. C. 437; *Salyards*, 46 M. C. C. 303. In each of these cases and many others decided by the Commission, the transporter was found to be a common or contract carrier within the definitions

On the other hand, notwithstanding that the transporter received payment for transportation as a separate item or a sale price at destination higher than cost at point of origin, he has been held in many cases to be a private carrier. Typical of such cases are: *Murphy*, 21 M. C. C. 54; *Spanhake*, 21 M. C. C. 258; *Dull*, 32 M. C. C. 158; *Woitishek*, 42 M. C. C. 193; *John S. Teeter & Sons, Inc.*, 43 M. C. C. 200; *Tyrrell's, Inc.*, 44 M. C. C. 552; *Katz*, 46 M. C. C. 869; and the two cases in issue here. The transporters in these cases perform exactly the same function as do the avowed for-hire carriers and are compensated for it.

In all the cases referred to in the two preceding paragraphs, the ultimate finding was made to depend upon whether the transporter was engaged in a "primary business" in connection with which the transportation was performed and whether he engaged in the transportation activity with a "purpose to profit" therefrom. The Commission says, and the District Court agrees, that if it is established that the primary business of the transporter is the manufacture or sale of the goods transported and the transportation thereof is in furtherance of that business and merely incidental thereto, the carriage from factory or

other place of business to the customer is private carriage even though a charge for the transportation is included in the selling price or is added as a separate item, if there be no purpose to profit from the transportation. This holding erases the distinction between compensation and hire. These criteria are not found in the Act but were devised by the Commission from consideration of the definition of "private carrier by motor vehicle" in § 203(a)(17) and applied by the Commission with the approval of the District Court in the cases at bar. That definition reads:

> "(17) The term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle,' who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise."

Neither this definition nor those of common or contract carrier make any reference whatever to the "primary business" of the transporter or his "purpose to profit" from his transportation. Moreover, since the private carrier definition expressly excludes from its scope carriers included in either of the other carrier definitions, and, further, since the exclusion discloses a legislative intent not to classify as private carriers those who receive recompense for transportation of property which they own, etc., or in furtherance of any commercial enterprise, it is plain that the legislative intent was to classify and regulate all carriers receiving direct or indirect compensation for and measured by the extent of the service performed as common or contract carriers. In other words, the status of a carrier, once he is found to be receiving compensation for his services, is to be

determined by reference to the first two definitions and without any reference to the third. In *Schenley Dist. Corp.* v. *United States*, 326 U. S. 432, 436, the Supreme Court speaking of § 203(a)(17) said: "But that section applies only to the extent to which 203(a)(15) does not * * *." This precludes any consideration of the "primary business" of the operator or his purpose, if any, to profit from his operations. If he carries for compensation, he is to be regulated as a common or contract carrier. The objectives of the national transportation policy, its directive to the courts and the Commission to administer and enforce the Act to carry out its purpose, and the manifest intent of the Act to promote and protect the interests and well being of the common carriers, rail, motor and water[4] demand as much.

The decisions of both the Commission and the District Court are out of harmony with these objectives and purposes, and the Congressional directive.

When the facts of a motor carrier operation have been examined under the tests or criteria of paragraphs (14) and (15) of §203(a), the definitions in which are in themselves complete, there is no need to go further. The status of the operator as a common or contract carrier will then have been determined.

The sole office of the private carrier definition as shown by its exclusionary provisions and upon further examination of the Act and the history of the definition is to describe those carriers to be brought within the reach of any regulations the Commission might adopt under §204(a)(3) and the investigative directions in §226. Sec. 204 (a)(3)

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[4] Interstate Commerce Act § 218(b), 49 U.S.C. 318(b); *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 82-83; *A. W. Stickle & Co.* v. *I.C.C.*, 10 Cir., 128 F. 2d 155, 159; Filing of Contracts by Contract Carriers, 20 M.C.C. 1, 11; Keystone Transportation Co., 19 M.C.C. 475, 495; Citrus Fruit from Florida to North Atlantic Ports, 266 I.C.C. 627, 635.

authorizes the establishment for "motor carriers" and "private carriers of property," if need therefor is found, of regulations to promote safety of operations, etc. Sec. 226 authorizes the Commission to investigate and report on the need for Federal regulation of the sizes and weights of motor vehicles and of the qualifications and hours of service of employees of all "motor carriers" and "private carriers of property."

The private carrier definition first appeared in §325 of H. R. 5262, 74th Cong., 1st Session, prepared by Coordinator Joseph B. Eastman and transmitted to Congress by the Commission. Senate Document No. 152, 73rd Cong., 2nd Sess. Subsequently, the Commission and the Coordinator transmitted a redraft of the bill which became S. 1629, 74th Cong., 1st Sess., and, as amended in committee, became part II of the Act. Sec. 325 of S. 1629 originally was the same as §325 of H. R. 5262 and eventually became §226 of the Act. In explaining revisions of S. 1629 to the Senate, Senator Wheeler stated that the private carrier definition "is transferred by the committee from a later section and applies to persons transporting their own goods in their own motor vehicles for commercial purposes." 79 Cong. Rec., 74th Cong., 1st Sess., p. 5651. The purpose of transposition is quite apparent. The committee added to the bill what is now paragraph 3 of §204(a). With two sections making reference to "private carriers of property" it was necessary for the sake of consistency and logical arrangement to transpose the definition into §203(a), devoted entirely to definitions.

"The province of construction lies wholly within the domain of ambiguity" Hamilton v. Rathbone, 175 U.S. 414, 421. No claim is made that the common and contract carrier definitions are ambiguous. Construction, whether by reference to matter extraneous to the statute or otherwise, is called for only when the plain words of a statute lead

to an obviously absurd or unreasonable result plainly at variance with the policy of the legislation as a whole. United States v. American Trucking Asso., 310 U.S. 534. And although the Commission's construction has been more or less consistent, has been indulged in for a considerable period and has been definitely settled so far as the Commission is concerned, the court is not bound to and will not follow or apply it in the face of the clear provisions of the Act and counter to the declared policy thereof. I.C.C. v. Railway Labor Ex. Asso., 315 U.S. 373; United States v. Missouri Pacific R. Co., 278 U.S. 269.

It is submitted that the decisions of the District Court and the Commission fail to give effect to the expressed terms and intent of the Act and are at variance with the national transportation policy.

Respectfully submitted,

/S/ JOHN T. GRIGSBY,
/S/ WALTER L. BAUMGARTNER,
/S/ FRANCIS E. BARRETT,
/S/ ROBERT J. MCBRIDE,
/S/ ALBERT B. ROSENBAUM,
Counsel for Plaintiffs-Appellants.

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

I concur in this opinion.

/S/ ALBERT V. BRYAN,
U. S. District Judge.

Oct. 2-50.

Civil Action No. 1149

BROOKS TRANSPORTATION COMPANY, INCORPORATED; A. B. & C. MOTOR TRANSPORTATION COMPANY, INCORPORATED, and M. & M. TRANSPORTATION COMPANY, *Plaintiffs*,

Versus

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, *Defendants.*

(Argued September 22, 1951, Decided ——)

Before Dobie, Circuit Judge, and Hutcheson and Bryan, District Judges.

DOBIE, Circuit Judge:

This is a suit to enjoin, vacate, and set aside orders of the Interstate Commerce Commission, dated May 27, 1948, and June 21, 1948. The order of May 27, 1948, was entered in the Commission proceeding entitled *Lenoir Chair Company Contract Carrier Application*, Docket No. MC 96541, and the order of June 21, 1948, was entered in *Schenley Distillers Corporation Contract Carrier Application*, Docket No. MC-107079.

By application filed with the Commission on March 25, 1946, Lenoir Chair Company of Lenoir, North Carolina, (hereinafter referred to as Lenoir), sought a permit au-

thorizing continuance of operation as a contract carrier by motor vehicle, over irregular routes, in interstate or foreign commerce for the transportation of furniture of its own manufacture and of materials, supplies, and machinery used, or to be used, in the manufacture of furniture, throughout a territory embracing all points in fifteen States and the District of Columbia. The application alleged that the motor vehicle operations involved were not those of a common or contract carrier but constituted private carriage only, and in order to secure a determination of this question by the Commission, it requested that the application be dismissed for want of jurisdiction, otherwise that it be granted a permit to engage in the operations described in the application. This is a correct method of securing a determination of its status. Schenley Distillers Corp. v. United States, 326 U. S. 432.

The application was assigned for hearing before an examiner of the Commission and hearing was held September 19, 1946. The evidence submitted by applicant related solely to the question of applicant's status. On December 23, 1946, the report recommended by the examiner was served on the parties to the proceedings. This report contained a finding that the applicant's operations were those of a private carrier and recommended that an order be entered dismissing the application. Thereafter, on February 11, 1947, exceptions were filed to the examiner's proposed report and recommended order by certain protestants and interveners and following replies to the exceptions by applicant and certain other interveners the Commission by Division 5, on May 27, 1948, issued its report in which the conclusion was reached that applicant was not a common carrier or a contract carrier but was a private carrier.

Schenley Distillers Corporation (hereinafter referred to as Schenley) filed its application with the Commission May 7, 1946, seeking a permit to operate in interstate or foreign

commerce as a contract carrier by motor vehicle over irregular routes in the transportation of alcoholic liquors of its own manufacture or that of its subsidiaries, and of materials and supplies used in their manufacture and sale throughout a territory including all points in fourteen States and the District of Columbia. The application alleged that the operations involved were those of private carriage and not common or contract carriage and requested the Commission to dismiss the application. The purpose of the application, just as that filed by Lenoir, was to secure a determination of the applicant's status with respect to whether it was a private carrier or a common or contract carrier.

The application was heard by an examiner of the Commission on September 5, 1946, at which evidence was introduced by applicant which related only to its status. On March 11, 1947, the report recommended by two Commission examiners was served containing a finding that the proposed operation by the applicant was that of a contract carrier by motor vehicle and not that of a private carrier. They further found that applicant had failed to establish that the operations involved would be consistent with the public interest and the National Transportation Policy and recommended that an order be entered denying the application. Thereafter, on March 14, 1947, exceptions were filed to the examiner's proposed report and recommended order by applicant and an intervener to which replies were duly filed by certain intervening protestants. On June 21, 1948, the Commission, by Division 5, issued its report which contained conclusions differing from those recommended by the examiners. In its report Division 5 (one of its three members dissenting) found that applicant's operations were not those of a common or contract carrier by motor vehicle as defined by the Act and dismissed the

application. This finding, it will be observed, had the effect of holding that applicant was a private carrier.

Being dissatisfied with the decision of Division 5, certain intervening protestants, including some of the intervening plaintiffs herein, filed petitions in both the Lenoir and Schenley proceedings requesting reconsideration by the entire Commission and oral argument. By order dated January 3, 1949, the Commission reopened both proceedings for oral argument and denied the petitions in all other respects. Since the proceedings in each case presented similar issues, the applications of both Lenoir and Schenley were heard together on oral argument before the entire Commission on April 21, 1949, and were disposed of in one report. Following the oral argument and after careful and thorough consideration of the issues involved, the Commission (one Commissioner dissenting and two others necessarily absent and not participating in the proceeding) found that both Lenoir and Schenley were not common or contract carriers by motor vehicle as defined by the Act, and that the applications should be dismissed. In view of the fact that the prior orders of Division 5 dismissing the applications were not vacated or set aside and remained in full force and effect, no further order was entered in either proceeding.

After these findings by the entire Commission, this suit was brought to enjoin and set aside the orders of Division 5 which held Lenoir and Schenley to be private carriers.

The facts in the case are not in dispute. The only question involved is one of law, namely, did the Commission err in finding that Lenoir and Schenley were not common carriers as defined in Part II of the Interstate Commerce Act (hereinafter called the Act), Section 203 (a) (14), or contract carriers as defined in Section 203 (a) (15), but private carriers as that term is defined in Section 203 (a) (17) of the Act (49 U.S.C., sec. 303 (a) (14), (15) and (17)).

The pertinent provisions of the statute involved in this case are found in Section 203 (a) which provide that as used in Part II of the Interstate Commerce Act:

"(14) The term 'common carrier by motor vehicle' means any person which holds itself out to the general

public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, * * *

(15) The term 'contract carrier by motor vehicle' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation.

(17) The term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle,' who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise."

The facts as to Lenoir and Schenley, as found by Division 5, may be briefly summarized: Lenoir operates five trucks in long-distance hauling and six or seven trucks in interplant service. It transports furniture from its plants to customers in the States named in the application, and whenever possible these vehicles are loaded on return with commodities used by applicant in its plants. Apparently at one time it did haul commodities for others, that is, persons other than itself or its customers, but this practice was discontinued some years ago, and applicant now transports and desires to transport out-bound, in interstate or foreign commerce, only its finished furniture to its factories. Of its total annual production, approximately $3,000,000, only between fifteen and twenty percent has been transported in its own trucks, the balance being transported by rail and motor common carriers. Its sales are made f.o.b. its factories. When it delivers furniture in its own vehicles it adds to this factory price a charge comparable to the charges of rail or motor carriers who are also used to the same destinations, and shows this figure separately on the

invoice. This is done in order that the delivery price at destination will be the same whether the furniture moves in applicant's vehicles or is transported by a carrier for hire and also "so as not to be unfair competition to any other carrier." Supplies and materials used by applicant are usually purchased f.o.b. origin, although sometimes a freight allowance is made by the supplier.

For some years Lenoir has maintained an account which reflects the income and expenses incurred in the operation of its trucks. Its representative was not certain how this account reflected transportation performed by its own vehicles when supplies are purchased f.o.b. origin. Where a freight allowance is granted, however, this amount is shown. On out-bound shipments, the amount collected, equal to the motor or rail rate, is shown. During the last six months of 1945 this account showed an income of $15,412.76 and expenses of $21,935.89, or a loss of $6,523.13. The total miles traveled during this period was 102,350. Total income for the first six months of 1946 was $13,461.33, and total expenses were $25,684.25, or a loss of $12,222.92. The total distance traveled in this period was 102,670 miles.

In many instances Lenoir's vehicles return empty to its plants. Thus the possibility of a return haul influences to some extent Lenoir's determination whether it will use its own vehicles for the out-bound transportation of its furniture to particular destinations. It is claimed, however, that this consideration is not absolutely controlling because considerations such as the needs of the customers, the availability of for-hire carriers, the expedition of delivery and good will are also given weight. Lenoir does not hold itself out to the general public or to anyone as a common carrier by motor vehicle. Neither are its services available to anyone as a contract carrier by motor vehicle under individual agreements or contracts. It desires only to continue the business of transporting its own manufactured products to its customers and to return to its plants supplies and materials used by it in its furniture manufacturing business.

Schenley now owns thirty-two tractors, thirty-one semitrailers, and one service truck. It rents garage facilities

at Lawrenceburg near the distillery of one of its subsidiary corporations, Schenley Distillers, Inc. At Lawrenceburg, it employs drivers and mechanics, and also a transportation engineer who superintends and manages the motor operations. At the time of the hearing herein in September, 1946, its motor operations were confined to service to and from the Lawrenceburg distillery of Schenley Distillers, Inc. However, Schenley intends to operate to and from other of its subsidiary corporations.

In 1945, the motor vehicles then owned by Schenley Motor transported less than 0.05 percent of all shipments moving to and from three of applicant's subsidiary corporations. While this record does not disclose the present percentage of traffic handled by Schenley's vehicles, apparently it is substantially the same as that in 1945.

Schenley purchases and takes title to the entire output of case liquors of its subsidiary corporations at the distilleries. All out-bound transportation performed by Schenley's vehicles consists of the movement of packaged liquor sold by Schenley to various purchasers.

When packaged liquor sold by Schenley is transported to the purchaser by rail and motor common carriers, it is sold f.o.b. point of origin. However, when it moves in Schenley's vehicles, it is sold f.o.b. destination. The price of packaged goods delivered directly to the purchaser in Schenley's vehicles is the selling price at origin plus a sum roughly equivalent to the rail rate from origin to destination. Thus a uniform delivery price is maintained in all instances regardless of the method of transportation utilized by the customer.

All expenses incurred in the operation of its vehicles including repairs, the wages of drivers, mechanics and other of its employees, are paid by Schenley and accounted for in its books. Claims for loss and damage of packaged liquor are filed with and, if warranted, paid by Schenley. Should a purchaser file a loss or damage claim with one of Schenley's subsidiary corporations, it would be forwarded to Schenley for investigation and adjustment.

When Schenley's vehicles are utilized for the described out-bound service, no bills of lading are issued nor is any

contract of transportation entered into between Schenley and any other party. Information with respect to origin, destination, consignee, and weight is recorded on what is known as a "Schenley Affiliates Trip Sheet" by the traffic department of the particular subsidiary corporation which distilled the liquor. Eight copies of this trip sheet are made, but nowhere thereon is there any stated or segregated amount for transportation. The traffic managers of Schenley's subsidiaries, while not employees of Schenley, are under the supervision of Schenley's general traffic manager.

All distillery supplies such as bottles, labels, corks, acids, soda ash, corn steep liquor, caramel, and concentrates, are purchased f.o.b. point of origin apparently by Schenley's subsidiary corporations. Schenley's vehicles handle an occasional in-bound movement of these distillery supplies at the request of the traffic manager of the particular subsidiary corporation. As stated, the traffic managers of the various subsidiary corporations are not employees of Schenley but are under the supervision of Schenley's general traffic manager. None of the expenses incurred in the operation of Schenley's vehicles even in this in-bound service is charged against any of its subsidiary corporations. When these in-bound supplies reach the subsidiary corporation, they are carried in its inventory. As is the case with all out-bound transportation, no bills of lading are issued nor is any contract of transportation entered into between Schenley and any other party, but all pertinent information is listed on a "Schenley Affiliates Trip Sheet."

We think the Commission's interpretation of the Act, and its holding that both Lenoir and Schenley are private carriers, is correct on the score of reason and authority and in the light of the history and manifest purposes of the Act. The injunction sought by plaintiffs must, therefore, be denied and their civil action must be dismissed.

The Commission, in deciding that Lenoir and Schenley are private carriers, as opposed to contract carriers or common carriers, applied what is known as *the primary business test.* In other words, if it is established that the primary business of a concern is the manufacture or sale of goods which the owner transports in furtherance of that

business and the transportation is merely incidental thereto, the carriage of such goods from the factory or other place of business to the customer is private carriage even though a charge for transportation is included in the selling price or is added thereto as a separate item. The Commission has so held consistently in its interpretation of the statutory provisions regulating the various categories of motor carriers. See, Congoleum-Nairn, Inc., Common Carrier Application, 4 M.C.C. 619; Swanson Contract Carrier Application, 12 M.C.C. 516; Murphy Common Carrier Application, 21 M.C.C. 54; Dull Contract Carrier Application 32 M.C.C. 158; Woitishek Common Carrier Application, 42 M.C.C. 193.

In the Woitishek case (discussed at length in all the briefs before us), the primary business test, as a criterion for distinguishing between (on the one hand) private carriers and (on the other hand) contract and common carriers, was carefully reexamined and reanalyzed by the Commission, and the conclusion was reached:

> "After careful consideration of the entire subject, * * * that we should continue as in the past to determine all issues of for-hire versus private carriage on the basis of the operator's primary business."

Though the question here involved is one of law, it is well settled that the courts should give great weight to the Commission's interpretation of the Act. Thus in *Levinson* v. *Spector Motor Co.*, 330 U. S. 649, 672, Mr. Justice Burton said:

> "As conclusions of law, these do not have the same claim to finality as do the findings of fact made by the Commission. However, in the light of the Commission's long record of practical experience with this subject and its responsibility for the administration and enforcement of this law, these conclusions are entitled to special consideration."

See, also, *United States* v. *American Trucking Association*, 310 U. S. 534, 549; *Colgate-Palmolive-Peet Co.* v. *United States*, 320 U. S. 422, 426; *McLean Trucking Co.* v. *United*

States, 321 U. S. 67, 87-89; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315.

It might be well to emphasize at this point that in the instant case both Lenoir and Schenley transport in their own motor vehicles property which they (or, in the case of Schenley, its subsidiaries) manufacture and own at the time the transportation services are performed. They carry for no one else and do not hold themselves out to do so. The goods transported are for sale and in furtherance of their primary business of manufacturing. While a charge of transportation is either included in the sales price of their goods or is added to the selling price as a separate item, in either event no charge is made for the transportation as such. Neither company is primarily engaged in the transportation business. The facts show that they transport only a very small percentage of their total products, and that the cost of the transportation exceeds the revenue derived therefrom. Measured by the test contained in the statute, the Commission, we think, has found correctly that neither Lenoir nor Schenley is either a contract carrier or a common carrier, but each is a private carrier.

The Commission's application of the primary business test as a criterion for distinguishing between common and contract carriers on the one hand and private carriers on the other hand, has been quite generally upheld by the courts. In *Interstate Commerce Commission* v. *Clayton*, 127 F. (2d) 967, 969, Circuit Judge Phillips stated:

> "He does not hold himself out to the general public to haul coal for compensation. He does not haul coal for compensation to fill particular orders or under individual contracts or agreements. He has indulged in no subterfuge or design to avoid the requirements of Part II of the Interstate Commerce Act. The cost of the coal and transportation is $5.57 per ton. He sells it for $8.50 per ton. Thus he realizes a profit, both from the transportation and from the sale of the coal, the margin of profit being large enough to cover both.

> We conclude he is engaged in the bona fide coal business; that he transports coal of which he is the owner for the purpose of subsequent sale and in furtherance of a commercial enterprise; and that the trial court was warranted in finding that he is a private carrier."

In Interstate Commerce Commission v. Tank Car Oil Corporation, 151 F. (2d) 834, 837, Circuit Judge Waller said:

> "We think that Congress not only intended to say, but said, that if a person, in good faith, transports his own property for the purpose of sale or in furtherance of his own commercial enterprise he is a private carrier and, therefore, is not subject to the provisions of the Act."

Again, Circuit Judge Collet remarked, in Beggs v. Kroger Co., 167 F. (2d) 700, 702-703:

> "The defendant was not a common carrier or a contract carrier, but it was a private carrier of property by motor vehicle if defendant was engaged in the transportation of goods in interstate commerce for the purpose of sale or in furtherance of any commercial enterprise."

In A. W. Stickle Co. v. Interstate Commerce Commission, 128 F. (2d) 155, 160-161, cert. den. 317 U. S. 707, where the factual pattern warranted a different conclusion, Circuit Judge Phillips was careful to point out:

> "The transportation is not merely incidental to the business of selling lumber. It is a major enterprise in and of itself. The major portion of Stickle & Company's capital investment is in that enterprise, and the major portion of its payroll goes to employees engaged in that enterprise."

And see the dissenting opinion of Circuit Judge Huxman in this case.

Opposed to these cases is Interstate Commerce Commission v. Jamestown Sterling Corporation, 64 F. Supp. 121,

decided by a single District Judge. And, cf. Interstate Commerce Commission v. Pickard, 42 F. Supp. 351. In Schenley Distillers Corporation v. United States, 61 F. Supp. 981, 988, aff'd 326 U. S. 432, a subsidiary corporation engaged solely in transporting for its parent corporation and other subsidiaries was held to be a contract carrier, but Circuit Judge Maris was careful to note:

> "In each of these as well as many other cases cited in which it was necessary to determine whether the carriage was for hire or was private carriage it was found helpful to determine whether the primary business was the supplying of transportation or whether the transportation was merely incidental. The problem there requiring solution does not concern us since in this case it is undisputed that the primary and indeed the sole business of Motor Division is that of transportation."

Counsel for plaintiffs here point out that under the statutory definitions one is a private carrier only if one is "not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle.'" This is true, and equally true is it that the term "compensation" is found only in the statutory definitions of common carrier and contract carrier, not in the definition of private carrier. But it does not follow, as plaintiffs contend, that wherever compensation, direct or indirect, is found, the carrier is (with only those exceptions made express in the Act) a common carrier or a contract carrier.

Plaintiffs are here attributing to the term "compensation" a mystical significance which the term does not possess. There are fallacies in this connection even if resort be had, as plaintiffs wish, to mere mechanical logic and a purely analytical interpretation of the terms used in the statutory definitions. Thus, the clause "when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise" appears (a) in the definition of private carrier, but not (b) in the other two definitions, common carrier and contract carrier. Accordingly, by this same logic, the basic difference be-

tween (on the one hand) common carriers and contract carriers and (on the other hand) private carriers, is whether or not the "transportation is for the purpose of sales, lease, rent or bailment, or in furtherance of any commercial enterprise." Possibly, this confused thinking of plaintiffs may be due somewhat to the fact that at common law, the common carrier of goods must carry for a compensation. See, Dobie, Bailments and Carriers, 296, 300, 304.

The history of the Act, we think, completely demolishes the validity of plaintiff's *compensation* criterion and supports the Commission's criterion of *Primary business purpose.* In the "Hearings before the Committee on Interstate Commerce, United States Senate, 74th Congress, 1st Session on S. 1629" (Government Printing Office, Washington, 1935), page 86, the late Commissioner Joseph B. Eastman testified as follows in response to questions asked by Senators Hastings and Wheeler (as to whether the proposed bill to regulate motor carriers would regulate the transportation by owners of their own goods being transported to their customers):

> "Well, I was going to say that in instances where the trucker actually buys the products which he transports, if that is a bona fide transaction and not merely a device to evade regulation, he would be a private carrier."

Representative Holmes, in explaining the provisions of the Act to Members of the House, said:

> "In other words, the department stores in Washington that may sell a bill of goods to be delivered in Philadelphia, New Jersey, or Massachusetts, do not come under the provisions of this bill because they are private owners of motor vehicles."

Again, during the debate on the Act, Senator Wheeler pointed out:

> "The definition of 'private carrier of property by motor vehicle' is transferred by the Committee from a later section and applies to persons transporting

their own goods in their own vehicles for commercial purposes. The only regulation to which such carriers are subjected is that with respect to the maximum hours of service and qualifications of employees and the safety of operation and equipment—section 204 (n) (3)."

To like effect is the statement of Senator Reed:

"I think the time may come when we shall have to regulate the transportation of private property by the owner of such property when it is transported for commercial purposes. But I fully concur in the statement of the chairman of the committee that there is nothing in the bill which undertakes to do it."

Again, note the dialogue between Senators McKellar and Wheeler:

Mr. McKellar: "To use the illustration I gave a while ago, if a private concern in Memphis, Tenn., desires to deliver its goods to the South, in Mississippi, or to the West, in Arkansas, it may do so without coming within the provisions of the bill?"

Mr. Wheeler: "Exactly. The most attempted to be done—that has not been done—is to try to regulate the safety conditions. There is a provision in the old law, which remains the same with respect to safety provisions."

Finally, in this connection, it may be noted that, by a vote of 54 to 21, the Senate rejected the so-called Shipstead Amendment. Senator Shipstead proposed to add to the bill S. 2009 a clause amending the Federal Trade Commission Act to make it a violation of law "for any person, partnership or corporation to so fix the price at destination of any goods or commodities transported in commerce, that such price includes a charge for transportation, based upon railroad rates, for any part of the transportation of such goods or commodities which was not conducted by railroad." Congress also rejected the so-called Miller-Wads-

worth amendment in favor of the *compensation test*. Nor has Congress, evidently quite aware of the consistent practice of the Commission in applying the *primary business test* in determining the statutory status of carriers, ever amended the Act so as to negative this practice. If the *compensation test* should be rigidly applied, it is not difficult to foretell the vast volume of cases which would thereby be cast on the already heavily burdened Interstate Commerce Commission.

We deem it not inappropriate to consider what might be called the economic approach to the problem before us, in the light of what might be called the felt needs and the best interest of the interstate carriers of goods by motor vehicle. In our considered judgment, such an approach strongly favors the *primary business test* as against the *compensation test*. And the problem before us is preeminently one that should be solved not by theoretical abstractions or by excursions into juristic semantics but rather by practical common-sense. Just what type or measure of compensation was intended by Congress to bring the carriage within Section 203(a)(14) or (15) is best ascertained by the *primary business test*. And, in the application of this test, the motive to profit by the carriage and the relation of the carriage to the business involved are important elements.

Though the point was not stressed by counsel for plaintiffs, either in the briefs or in oral argument, we think it well to state that we see nothing in the instant case even tending to show that Schenley is attempting by subterfuge to evade the impact of the decision in *Schenley Distillers Corporation* v. *United States*, 61 F. Supp. 981, affirmed in 326 U. S. 432.

In considering the reasons why commercial concerns, such as stores or factories, having goods for sale, should resort to transporting them in their own motor vehicles, the Commission stated (Sheet 12, Exhibit G to the Complaint herein):

> "It is recognized that there are a number of very good reasons, apart from a desire to set up a separate business for profit, which prompt mercantile, or com-

mercial concerns to conduct all or a portion of their own motor operations rather than to rely upon the services of for-hire carriers. Not the least among these reasons is the matter of good will fostered by the prompt and efficient delivery of rush orders to customers. Other advantages accruing to a private carrier flow from its absolute control over, and exclusive use of, the motor equipment assuring (1) the absence of congestion at loading docks, (2) the safe arrival of goods not mixed with goods of other shippers and not exposed to extra or inexperienced handling, and (3) on-time deliveries of finished goods at customers' doors and of raw materials and supplies at its plant. The use of its own equipment also enables a private carrier to avoid expensive packaging sometimes necessary when shipment is by motor common carriers."

The application of plaintiffs for an injunction and for a judgment vacating and setting aside the instant orders of the Interstate Commerce Commission is denied and the complaint of plaintiffs is dismissed.

Complaint dismissed.

I concur—

(S.) STERLING HUTCHESON,
U. S. District Judge.

Oct. 3, 1950.

Appendix A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

Civil Action No. 1149

BROOKS TRANSPORTATION COMPANY, INCORPORATED, A B & C MOTOR TRANSPORTATION COMPANY, INC., M & M TRANSPORTATION COMPANY, *Plaintiffs*,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Defendants*

ORDER OF DISMISSAL

This action having come on for hearing on the 22nd day of September, 1950, before a statutory Court composed of Armistead M. Dobie, Judge of the Court of Appeals for the Fourth Circuit, Sterling Hutcheson, United States District Judge for the Eastern District of Virginia, and Albert V. Bryan, United States District Judge for the Eastern District of Virginia, upon the pleadings filed herein, the arguments of counsel and briefs submitted herein, and the Court having maturely considered the same, and having filed its opinion herein on October 3, 1950, it is

Ordered, Adjudged and Decreed that the above-styled action be, and the same is hereby, dismissed.

(S.) ARMISTEAD DOBIE,
Judge, Court of Appeals,
Fourth Circuit;
(S.) STERLING HUTCHESON,
United States District Judge;
(S.) ALBERT V. BRYAN,
United States District Judge.

October 21, 1950.

Appendix A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

Civil Action No. 1149

BROOKS TRANSPORTATION COMPANY, INCORPORATED, A B & C MOTOR TRANSPORTATION COMPANY, INC., M & M TRANSPORTATION COMPANY, ET AL., *Plaintiffs*,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Defendants*

FINAL JUDGMENT

This action having come on for hearing on the 22nd day of September, 1950, before a statutory Court composed of Armistead M. Dobie, Judge of the Court of Appeals for the Fourth Circuit, Sterling Hutcheson, United States District Judge for the Eastern District of Virginia, and Albert V. Bryan, United States District Judge for the Eastern District of Virginia, upon the pleadings filed herein, the arguments of counsel and briefs submitted herein, and the Court having maturely considered the same, and having filed its opinion herein on October 3, 1950, it is

Ordered, adjudged and decreed that the above-styled action be, and the same is hereby, finally dismissed on the merits, and that the defendants recover from the plaintiffs their costs and have execution therefor.

(S.) ARMISTEAD DOBIE,
Judge Court of Appeals, Fourth Circuit.

(S.) STERLING HUTCHESON,
United States District Judge.

(S.) ALBERT V. BRYAN,
United States District Judge.

Dated: November 17, 1950.

Appendix B

Statutes Involved

Section 203(a)(14)(15)(17) (49 Stat. 544; 54 Stat. 920; 49 U.S.C. §303(a)(14)(15)(17)) of the Interstate Commerce Act, as amended:

Sec. 203(a) As used in this part—

(14) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be a considered to be and shall be regulated as transportation subject to part I.

(15) The term "contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation.

(17) The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle", who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

Preface to Interstate Commerce Act (added Sept. 18, 1940, 54 Stat. 899)

National Transportation Policy

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial

regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; all to the end of developing, cooordinating, and preserving a national transportation system by water, highway, and rail as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Prior to Sept. 18, 1940, a declaration of policy appeared in the Interstate Commerce Act as section 202(a) (49 Stat. 543) and read as follows—

Sec. 202(a) It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part.